STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of the
Dispute Between the

Service Employees' International Union
Local 1401, AFL-CIO
and

the Milwaukee Board of School Directors

WERC Case 366
No. 56691
Voluntary Impasse Procedure
Decision No. 29641

Appearances:

Ms. Marianne Goldstein Robbins and Ms. Heather Rastorfer of Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C. 1555 N. RiverCenter Dr., Milwaukee, WI. And Mr. Steven J. Cupery, SEIU Local 150 Staff Representative, 8021 West Tower Ave., Milwaukee, WI. for the Union. Mr. Donald L Schriefer, Assistant City Attorney, City of Milwaukee, 800 City Hall, Milwaukee, WI. for the Employer.

Sworn Testimony was received from:

Ms. Julie Bast, Skilled Nurse Associate, Milwaukee Public Schools
Ms. Bonnie Vick, Principal, Milwaukee Public Schools (Gaenslen School)
Mr. Donald Ernest, Assistant Executive Director, Milwaukee Teachers Education Association,
Mr. Steve Cupery, Service Employees International Union Local 150 Representative
Mr. Darryl Evans Service Employees International Union Local 150 Representative (Building Service Helpers)
Mr. William Andrekopoulis, Principal, Milwaukee Public Schools (Fritsche Middle School)
Ms. Benita Hagen, Nursing Supervisor, Division of Special Services, Milwaukee Public Schools
Mr. David Kwiatkowski, Coordinator of Classified Staffing, Milwaukee Public Schools
Ms. Kathy Linzmeyer, Nursing Supervisor, Division of Special Services, Milwaukee Public Schools
Ms. Deborah Ford, Director of Labor Relations, Milwaukee Public Schools

Background

On June 8, 1999 , the parties submitted joint request to the Commission requesting that an impartial arbitrator, the Undersigned, Richard Tyson, be appointed pursuant to the parties' voluntary impasse resolution procedure for the resolution of a dispute over two items for inclusion in their 1997-99 agreement. He was so appointed on that day. He conducted a hearing on the matter on June 10, 1999 and September 14, 1999 at the Milwaukee Public Schools District Offices, 5225 West

Vliet St., Milwaukee Wi. A transcript of the hearing was taken. Both parties had an opportunity to present exhibits and testimony and to outline their arguments in this dispute. They agreed to a schedule for exchanging briefs and replies which was subsequentely amended. The last reply brief was received on January 8, 2000.

The Issue(s)

Several issues were resolved in the bargaining process; only two items remains in contention. A minor issue is whether the Employer shall continue to pay the full cost of the printing of the labor agreement as proposed by the Union or whether the Union should pay half of the cost of printing the Union's and employees' copies. The major issue deals with language regarding the transfers of Skilled Nurse Associates. The Union proposes that the SNAs select their base school sites by seniority "where knowledge, skill, and ability are relatively equal." They would remain at that site for the year unless there is a reduction in the served population at the site or the program closed. The Board has no proposal for the transfers of SNAs, and would continue the practice of having the Nursing Supervisors (2) assign the SNAs to home base sites (and the "floater" position) based on experience, SNA preferences, needs, "fit", and the desirability of rotating the SNAs.

There is some matter of the change in the status quo, the Union contends that the Employer must, but does not in its offer, provide a quid pro quo for taking away a current benefit, namely the contract printing. The Employer contends that the Union is seeking a status quo change by its language on base school assignments, though the Union contends that its proposal simply puts down in writing and clarifies the current practice.

Background

The District employs 16 Skilled Nursing Associates who are licensed to provide services to 180 special needs children attending 12 base and 18 satellite schools. Additionally the District employs about 200 regular and 50 substitute Handicapped Children's Assistants who are not licensed. Five SNAs were first hired in 1992 following passage of the Individuals with Disabilities Act. They are supervised by two Nurse Supervisors. The SNAs provide a range of duties such as feeding through gastronomy tubes, monitoring and reinserting trachea tubes, taking vital signs, urinary catheterization, moving students, giving insulin shots, and operating suction machines. These services are physician ordered care delegated to a nurse.

Gaenslen Elementary School has an RN and three SNAs, one of whom is a "floater" available for short term assignments throughout the District. It has the most high-needs children and procedures to be performed. Other SNAs are assigned to base schools with up to four itinerant sites to visit.

The SNAs generally take brief training at Children's Memorial Hospital and receive orientation before the commencement of school. The District contends that a stint at Gaenslen is also part of their training.

Cost Costing of the proposals during the 1997-99 contract year is not a particularly relevant issue

and has not been provided by the parties.

The Statutory Criteria

The parties have directed their evidence and arguments to the statutory criteria of Sec. 111.70 (7) Wis. Stats. which directs the Arbitrator to consider and give weight to certain factors when making his decision. Those factors are:

7. 'Factor given greatest weight.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give the greatest weight to any state law or directive lawfully issued by a state legislative or administrative officer, body, or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer. The arbitrator or arbitration panel shall give an accounting of the consideration of this factor in the arbitrator's or panel's decision.

7. g. 'Factor given greater weight.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the factors under subd. 7r.

7. r. 'Other factors considered.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give weight to the following factors:

a. The lawful authority of the employer.

b. Stipulations of the parties.

c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any settlement.

d. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services.

e. Comparison of wages, hours and conditions of employment of the municipal employees

involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees generally in public employment in the same community and in comparable communities.

f. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees generally in private employment in the same community and in comparable communities.

g. The average consumer prices for goods and services, commonly known as the cost-of-living.

h. The overall compensation presently received by the employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

i. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

j. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, factfinding, arbitration or otherwise between the parties, in the public service or in private employment.

Arguments of the Parties

The Union

The Union contends that the Employer's proposal on the contract printing is an attempt to take away benefit through the arbitration process without any compensation in the form of a quid pro quo. Citing Arbitrators Nielson and Petrie, the Union notes that the proponent of such a change must have a good and compelling reason and a compensatory offer both of which are lacking in the Board's offer.[1] By its admission, the past practice of the Board was to pay for all the copies. The

[1]Northeast Wisconsin Vocational, Technical, and Adult Education District, Dec. No.

current agreement on wages is the pattern, though the Union gave up some monetary concession on drug co-payments. The internal comparisons favor the Union's offer. The Board pays for 8 of the 11 units' employees' contract copies. In the remaining three units where there is some cost sharing, the Unions agreed to a co–pay for printing costs since they wanted to assure pocket-sized copies and Union-printed material. The Board's proposal will assure neither.

The Union's proposal for a modified seniority clause in SNA site selection is consistent with the parties' past practice and bargaining history. Citing Arbitrator Petrie, the Union contends that these considerations are important determinants of what the parties to an interest dispute would have included in a "conventionally negotiated agreement."[2] When 5 SNAs were first hired in 1992, they were asked for their preferences as to assignments. The next year when more were hired, the "senior ones got first choice for 1993 assignments". When longer shifts were available, the more senior SNAs got first choice for the seven-hour shifts (vs. six-hour shifts).

The language in the prior and current contract provides that employees wanting to transfer can submit a request which will be "administered in accordance with system-wide seniority." (Appendix B) It also indicates that employees can't be involuntarily transferred without just cause (Part V, Sec. F). While the Board may contend that these apply to other unit employees, that position is inconsistent with the bargaining history and the Board's practice of applying other Appendix B provisions to SNAs. The provision regarding involuntary transfers refers to "employees;" where specific groups of employees have differing provisions, the labor agreement categorically lists which group is affected. The other contention by the Employer is that SNAs are centrally assigned employees so that the contract's transfer policy is inapplicable. Yet other centrally assigned units have seniority provisions.

25689-A (1989) and Village of Menomonee Falls, Dec. No. 25101-A (1998) respectively.

[2]City of Brookfield, Dec. No. 27486-A, 1993

The Union believes that its offer is reasonable. The District even had an offer on seniority in assignments not unlike its own on the table during negotiations. When the issue of "quality" of applicants arose, the union modified its offer to include the use of seniority when considerations of knowledge, skill, and ability show relative equality. Other bargaining units use seniority in site selection. Social Workers meet yearly for 30 minutes to fill open assignments; similarly, the Guidance Counselors who are new, back from leave, or interested in transferring meet on Organization Day and select their sites by seniority. While the Board contends that the trend is away from the use of seniority, it is still used in most cases. There is an interview process for Secretaries and Educational Assistants from among the most senior in the unit. Psychologists are assigned on seniority with the proviso that school needs are met. There are eleven "innovative" schools under interview provisions, but these fill vacancies, and do not remove teachers from their current positions. The SNAs are the only group who have assignments "controlled exclusively on the whim of management."[3]

The Employer claims that the union's proposal will somehow jeopardize the children's welfare because it somehow needs to match SNAs with them. The Board mentions various procedures which need to be performed, yet every SNA can perform them since these procedures are in the job description, and the nurses have been trained in them. The SNA supervisor testified that every SNA has the requisite skill. In any case, the union's contract provides for consideration of an SNA's abilities in site selection, and the current contract allows for just cause transfer if a SNA isn't fully capable. The Employer further claims that it needs the ability to route new SNAs through the Gaenslen school where there is an RN and two experienced SNAs. The principal of the school knew of no such arrangement, and half of the SNAs had not followed that route. As to the notion that for best performance, SNAs need to be rotated every two or three years, no evidence exists; moreover, some assignments have lasted five to six years.

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[3]Union Brief, p 13.

The Board alleges that under the Union's proposal, the school principal and parents will not be able to have their input in SNA selection. However, when SNAs have been moved, it has been contrary to or without principal input. No reassignment has ever occurred because of parent concerns. The Board also contends that under the Union's proposal, inexperienced SNAs will be left with the demanding "floater" position, and that it need s the ability to assign the right person for that job. When the Supervisors did assign a SNA to the position, they used the assignment to punish an SNA who had been disciplined for misconduct. On another occasion, the one which gave rise to a grievance by the union's chief witness, a SNA was transferred as punishment for disagreeing with the therapy which her own child was receiving at the Fritsche school. Others who have been involuntarily transferred have never been given reasons based on the "welfare of the children."[4] While the Board argues that since they did not testify at the hearing they must be satisfied with the status quo; the Union contends that they probably fear retaliation.

The Union's proposal reasonably balances employee preferences with the school needs. SNAs won't be changing positions frequently, and the employer has the assurance that selection will consider qualifications, and involuntary transfers will be allowed if objectively based.

The Board is attempting to change the status quo without providing a quid pro quo. The practice has been to honor seniority while the contract requires seniority based assignments and just cause for involuntary transfers. The Board's argument that SNAs are centrally assigned and not covered by these provisions because of a word processor error is dubious since the agreement was subsequently renegotiated without the Board offering a "correction."

In sum, in its contract printing proposal, the Board in its offer is simply trying to take away a benefit without compensation. It cannot show a compelling need to do so, nor can it show a clear pattern of support. In its position on the use of seniority in assignment, the Union is clarifying existing practice, assuring that employees preferences are considered and that they will not be whimsically or unfairly transferred.

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[4]Union Reply Brief, p. 5.

The Employer

The Employer contends that the use of seniority for job assignments is no longer a primary factor in the District, and particularly in this case when considering the fragile population served, its use is highly contrary to the public interest and may have life-or-death consequences. Not all SNAs are equally capable for all situations. The law and court rulings require that the school has an obligation to provide continuous nursing care rather than just routine and predictable care, and now to provide that care where parents choose. The District needs to be able to provide broader, more diverse placements in an expanding number of sites. Since the Nurse Supervisors are professionally responsible for most of the work done by the SNAs, they need to be able to determine the proper "fit" of care and child. Moreover, they need to be able to assure continuity and appropriate rotation of assignments. The transfer language of the contract is not applicable to the SNAs for these very reasons. The Union's proposal is ambiguous as to how the assignments will be made. The examples given for other units are alarming in that perhaps the most challenging assignments would be left for the least experienced SNAs. New SNAs may not be able to be assigned to Gaenslen, nor will the Nurse Supervisor be able to transfer a specially qualified SNA in the best interest of an individual child or children, or to accommodate desires for same-sex care for intimate procedures. Parents or principals will have little input in assignments. The Union's "relatively equal" language providing for managerial judgement would perhaps never be exercised. The other matter--of contract printing– is minor in its impact on the union (perhaps $750) and is properly a shared responsibility as is arbitration costs. Other classified staff share in these costs which regard matters of mutual concern and are therefore shared.

The use of seniority for job assignments is no longer a primary factor in the District. For the past eight years MPS has been moving away from seniority based assignments and toward more considerations of qualifications. Vacancies for teaching positions will largely be filled using an interview-based process. The Educational Assistants will no longer transfer based exclusively on seniority, but rather will interview at the schools. The ESL, Diagnostic Teachers, Deaf Interpreters, RNs and even the Administrative unit (ASC) will be assigned based on merit rather than seniority. Seniority is now less of a consideration for Engineers and Secretaries. The Food Service Managers who are in the SNA unit are cited as a comparable for this (seniority) matter by the Union. While the nature of work is substantially different, the Food Managers' bidding for assignments is more in accord with the District's position in the instant case in that the bidders are first evaluated for their relative qualifications, after which seniority is the determining factor. The District benefits from having these units' employees assigned on the basis of merit. The Union suggests that the interview

(vs seniority) process is only used in"11 innovative schools;" however, these as well as charter schools, reconstructed schools, and (so far) 93 of 160 regular schools where the staff has voted will also use the interview process.[5] The assignment of SNAs are even more sensitive to having the right "fit" with parents, the child, principal, teachers, not to mention skills, judgement, and other qualities of the SNA which may have less to do with seniority or the lack thereof.

The fragile population served requires that the Nurse Supervisors are able to make appropriate judgements is making SNA assignments. These may involve life-or-death consequences since in some cases children are not competent or cognizant. A tracheostomy tube may come out or be pulled out, requiring prompt, precise, and level-headed response. Blood-sugar level changes in diabetics have to be spotted and respiratory distress anticipated in children with such conditions. Not all SNAs are equally capable for all situations according to testimony of the Nurse Supervisor and even the chief union witness. Some SNAs have panicked in critical situations, others have had or expressed difficulty in certain settings or with certain procedures. Some lack experience or confidence. Assignments based on seniority would be clearly contrary to the public interest and the best interests of this population.

[5]Employer Reply Brief, p. 6.

The law and court rulings require that the school have an obligation to provide continuous nursing care rather than just routine and predictable care, and now, to provide that care where parents choose. The Individuals with Disabilities Act entitles every disabled child appropriate public education in the "least restrictive environment" including a neighborhood school.[6] The disabled population may shift, and parents may place their children in other schools than where special services have traditionally been provided. These decisions may mean that where private duty nurses are currently serving children, the district will have to step in. The District, through the SNAs, will have to provide broader, more complex services in an expanding number of sites. The Supervisors, however, are the ones responsible for the SNAs actions.

[6]Employer Brief, p. 13.

Since the Nurse Supervisors are professionally responsible for most of the work done by the SNAs, they need to be able to determine the proper "fit" of care and child. Moreover, they need to be able to assure continuity and appropriate rotation of assignments. Initially placements were fairly simply determined and considered SNA preferences. As more schools and SNAs were added, with increasing complexities of cases, that became more difficult. Currently, the assignments are made giving consideration to preferences, but emphasis has to be on the needs of the children. New SNAs are generally (9 of the current 16) assigned to Gaenslen for training and role modeling. Only capable, experienced ones are assigned to the "floater" position.[7] Some continuity is desired so SNAs are familiar with the children. Rotation is also necessary to reduce "burnout" and possible "enabling" tendencies. The Employer contends that a 3 to 4 year assignment is professionally regarded as optimal. Additionally, parent and principal input is used in determining assignments. These considerations (other than SNA preferences) could not be applied under the Union's proposal.

The Union contends that the transfer language of the contract (Appendix B) should apply to the SNAs. It has not been used for any open position. It only applies to the HCAs. While the section lists "employees" this was an inadvertent use of the "search and replace" function of the administrative employee who typed the new agreement when the SNAs were added to the unit. That issue aside, the language only applies to open positions, rather than as proposed by the Union. The involuntary transfer provisions (for "just cause") have not been used for SNAs. Moreover, the Board maintains that the SNAs are centrally assigned and that the (sub)section (6) only applies to the food service employees. The Union's claim that a HCA successfully grieved an involuntary transfer misrepresents facts, and that the HCA was not a centrally assigned employee.[8] The Union's chief witness has grieved an involuntary transfer but the union has not pursued it to arbitration. The Employer contends that this case (and any other alleged involuntary transfer issues) is not pursued because the Union knows what the policy is on assignments out of the Special Services Center.

The Union's proposal is ambiguous as to how the assignments will be made. The Union elicited testimony about how some other units assign by seniority. Applied to this unit, there would be ominous consequences of these procedures. Were the more senior SNAs to bid first they may likely

[7]The Union contends that this assignment has been used as a punishment; the Employer has responded that the disciplined employee was an experienced and versatile SNA. Employer Reply Brief, pp. 9-10.

[8]Employer Reply Brief, p. 4.

leave the least desired, most challenging assignments for the least experienced SNAs. Only in the case where two equally senior SNAs were to bid for the same post would the Supervisor to have an ability to determine who would get the position. Worse, challenging assignments with high-risk, changeable children "would be filled by default" with the least experienced SNA[9]. New SNAs may not be able to be assigned to Gaenslen, nor will the Nurse Supervisor be able to transfer a specially qualified SNA in the best interest of an individual child or children, or to accommodate desires for same-sex care for intimate procedures. Assignments may change annually or never under the Union's proposal, with "SNAs locked into a site for a year even if the (needs change)". [10] The proposal simply subordinates the needs of the children and the Nurse Supervisor's delegational responsibility to the desires of the SNAs.

[9]Employer Brief, p. 22.

[10]Employer Brief, p. 27.

By its proposal, the Union is attempting to change the status quo. It has shown no clear and convincing evidence of a need for the change. Only one SNA testified as to her dissatisfaction with the current system. While she said four others were as well, there is no evidence of their dissatisfaction. One was transferred by mutual agreement which then resulted in the union's chief witness (as the most logical choice) being transferred. No evidence exists that assignments have been arbitrarily made. Further, no quid pro quo has been made for such a change, or for the contract printing issue. The Union asserts that it gave a concession in the form of prescription drug co-payments though this is not linked to any particular issue. It also contends that its proposal is reasonable because a District negotiator originally proposed it in response to the Union. The proposal was not the position of the Board, but rather, completely contrary to its thrusts on this issue for the past several years.[11]

The Union asserts that it is not changing the status quo by its offer, but rather only formalizes current practice. This makes no sense since the Employer has no offer on the matter. The Union Representative offers its proposal *because* the SNAs can be moved every year.[12] The notion that in the second year of the program the initial five SNAs were asked if they wanted to remain at their sites and that this constitutes a seniority-based assignment system is incorrect.

The other matter--of contract printing–is minor in its impact on the union (perhaps $750 or $ .25 per year per employee) and is properly a shared responsibility as is arbitration costs; the contract is their joint product. Nearly half of the other classified staff share in these costs which regard matters of mutual concern and are therefore shared. The Union's contention that the three units which share in printing costs do so in order to assure union printing is simply speculative.

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[11]Employer Reply Brief, pp. 5-6.

[12]Employer Reply Brief, pp. 3-4.

Discussion and Opinion

The Statute requires the Arbitrator to consider the aforementioned criteria in making an award. Neither the Union nor the Employer indicated that state laws or directives limit the Employer's ability to pay the Union's offer. The parties also did not address the issue of economic conditions since this is also not relevant to this dispute. The criteria cited by the Parties as pertinent to this decision are the interests and welfare of the public (c), the internal (e.) comparisons as well other factors–the status quo change (j). Each of these is considered below by the Arbitrator. First, the Arbitrator would comment on the question of the status quo and related matters to which the parties gave considerable attention. The internal comparability factors are then addressed, followed by a discussion of the interest and welfare of the public.

Other factors: Status quo

The Board's proposal seeks a status quo change by having the Union pay for half of the printing costs of the employees' contract copies. The Union seeks a status quo change in the method by which SNAs a assigned to the various sites. This latter proposal is the more significant issue, though the Union maintains that it isn't a real change.

Arbitral authority and practice would indicate that the parties must present a compelling case for these proposals, that the proposals are a remedy or have intrinsic merit, and that they generally would need to offer an adequate quid pro quo, unless its offer has clear support such as among the comparables.[13] The argument has been made numerous times by this and other arbitrators that provisions which the parties have agreed to are best left to the parties to change, if at all possible, and that interest arbitration serves as an extension of the bargaining process. As such, the arbitrator seeks a settlement of disputed matters which the parties would have arrived at were they to have been able to resolve the matters themselves. A change in the status quo without a good and compelling reason or intrinsic merit and without some measure of adequate compensation for a

[13]see Vernon in Elkhart Lake and Bloomer School District (Dec. No. 43193-A and 24342-A), Nielson in Manitowoc Public Schools, (Dec. No. 26263-A), Petrie, in New Richmond School District, and more recently Petrie, in Burnett County (Social Service Employees) (Dec. No. 54837), Aug. 1998 where he writes:

> "..Wisconsin Interest Arbitrators normally require the proponent of change to establish a very persuasive basis for such a change, typically by showing that a legitimate problem exists which requires attention, that the disputed proposal reasonably addresses the problem, and that the proposed change is accompanied by an appropriate *quid pro quo*." (p. 28)

resulting loss or adverse effects would not be a likely result of a voluntary settlement. Such a change gained through the arbitration process may chill the future bargaining process and is therefore to be avoided.

The Employer asserts that the contract is a joint product of the parties and therefore its printing is a joint responsibility. Nothing has evidently changed in the parties' relationship or the circumstances of bargaining or any other factor which makes this assertion any more or less true for the 1997-99 agreement than for any predecessor agreement. By the parties' agreement, expenses for grievance arbitration transcripts are not equally shared, nor are health, dental, and vision care costs. From time to time these latter are renegotiated by unions and employers as part of packages and when compelling reasons for changes arise. One such example is the assumption of a portion of the health care insurance premiums and co-payments by employees for prescription drugs in response to dramatically increased costs in the 1990s, and the need for their containment. Coupled with substantial support among comparable employers and/or some measure of compensation, the status quo on such payments has changed in many cases. The Employer has not provided a compelling case for the need to make the change it seeks on printing cost sharing. Neither is there evidence of some compensation for this change. Whether or not there is substantial support for the proposal based on comparisons of other bargaining units is discussed below.

The Union's proposal must be seen as an effort to change the way that SNA assignments are made. On its face, the fact that the Employer has no proposal on the matter would suggest that it would continue to centrally assign the Skilled Nurse Associates and reassign them considering seniority, preferences, needs, "fit," and the judgement of the Nurse Supervisors as to the appropriateness of rotation. By its admission, the Board did give the first SNAs an opportunity to stay or transfer to newly created assignments after the first year of the program, as well as give them an opportunity to go to a seven-hour workday site. The Undersigned does not believe that this rises to a level of a clear, mutually acknowledged, long-standing, repeated practice. It does not establish the status quo as providing for site selection based on seniority and employee preference. Evidence of subsequent primary use of seniority in site selection has not been given, though the Nurse Supervisor cites it as an important factor in making assignments.

The Union has argued that Appendix B of the predecessor Agreement "required the Board to make assignments on the basis of seniority."[14] The Appendix B refers to transfers, stating that

[14]Union Brief, p. 8

"employees" (and not just Health Care Assistants) who want to transfer should submit a request which will be administered on the basis of systemwide seniority. The Undersigned does not take this to mean that the Union's proposal is the status quo, however, but rather that it is a process for allowing employees to request transfer to an unfilled or open position. Further reading of this provision also includes the sentence "(T)ransfers shall be considered after employees returning from leave or layoff have been assigned."(Contract p. 61, emphasis added) indicating that employer assignment is the status quo. Testimony of the Director of Labor Relations indicates that the word "employees" was included in this section by clerical error in the final draft of the agreement. The SNAs have always been centrally assigned employees. The Arbitrator notes that prior drafts sent to the Union included only "health care assistants" and there is no written record of the Union's disagreement, though Mr. Cupery indicated at hearing that he believed that there was verbal discussion for it to read "employees." The Union also contends that the status quo prevents the involuntary transfer of SNAs without good cause (Contract p. 39). This provision is in an "other provisions" section. The Union has argued that the several items discuss provisions for "food service employes'" working conditions but on this matter (no involuntary transfers except for just cause except as otherwise provided...) it states "employes" which indicates the intent is to cover all bargaining unit members.[15] The Arbitrator notes that some of the eight provisions in this section refer to food service "employees", some to food service "personnel", and one to food service "managers and assistants". He further notes that the exact language existed in the 1989-92 agreement, prior to the accession of the SNAs to the unit. In this context it would seem that the section pertained to the food service personnel, and more likely than not this item (#6) served to reserved the right of the Employer to transfer managerial personnel according to their skills, experience, and the needs of the district. The Arbitrator notes that such prohibitions against involuntary transfers is prevalent in the contracts with many other MPS units. This issue is not directly "on the table," however. Finally, the Arbitrator notes, as does the Board, that the basic reason for the Union's proposal is that the Board can, under the Agreement and its current practice assign SNAs.

[15]Union Brief, p. 9.

The Union's proposal provides for an annual site selection process of in a manner which is not specified. Clearly the Union's example of School Social Workers and Elementary Guidance Counselors site selection given at hearing would be a significant departure from the status quo in that the more senior employees have first choice of a school with little opportunity for the Supervisors' judgement. While the Union's proposal does not specify this manner of "bidding," the SNAs would select their sites with seniority being honored where there is relative equality of knowledge, skill, and ability. Contrary to the Board's assertion, the language of the Union's proposal would allow for both senior and non-senior bidders for the same sites with the assignment in some cases going to the less senior but more skilled SNA. But it would disallow considerations other than these three factors in the determination of who is assigned to the sites. It would also not allow for consideration of other factors such as "fit", overall needs of the population served, rotational considerations, and how to staff the least desired and perhaps the most demanding assignments. It also does not appear to allow for reassignment due perhaps to a shift in needs or the transfer of a child between schools.

The Union's evidence that there is a need for a change in the status quo is quite limited. Its chief witness testified that she was involuntarily transferred when the Employer transferred another SNA (by "mutual agreement") out of a school to her site. She had to add about 20 minutes to her commute to work and had to go in the opposite direction of her baby sitter. She also testified that others had been transferred to sites inconveniencing them, though direct testimony was not given. The Union suggests that the others might have testified of the adverse consequences of involuntary transfers were they not concerned about reprisals. While the Arbitrator is unable to conclude anything one way or another on this matter, he would simply note the obvious, that the (more senior) SNAs would be happier if they were to have their preferences for site assignments honored, and not to be moved unless they desire it. The Arbitrator finds intrinsic merit in this proposal, though consideration also must be given in comparison to how other employees in similar positions are treated, as well as to considerations of the interest and welfare of the public.

Internal comparables

Is the Employer's proposal supportable under 7(r)(e)? Excluding this unit there are over 12,000 employees in eleven units bargaining with the Milwaukee Public Schools. Of these, somewhat less than 900 employees are represented in three units wherein the union pays for half the costs of the union copies. The union selects the printer for two of these units while MPS selects the printer for almost all of the rest. This gives some credence to the Union's argument that these three units are exceptions. These are units representing classified employees, though an additional three units

representing numerically more classified employees have MPS providing the copies. While there may be some merit in cost sharing as a means to control printing costs, there does not appear to be "substantial support among the comparables" for the Board's proposal to change the status quo on this matter.

Is the Union's proposal supportable under 7(r)(e)? Here the evidence is mixed. Social Workers and Elementary Guidance Counselors select their sites by seniority. School Psychologists are assigned by the superintendent, and can be reassigned (but not for punitive reasons). The Psychologists pick vacancies in schools based on seniority but with the proviso that the person "meets the needs" of the position. The assignments are considered permanent. The Board will seek volunteers for reassignment for filling openings, and will discuss involuntary reassignment with the Psychologist affected before making the reassignment. Building Service Helpers vacancies are filled by seniority with some proviso for qualifications. For other positions, there is a mixture of the use of seniority, staff interviews (particularly in charter and other schools so electing), and managerial assessment and assignment. Vacancies in the largest unit, the Teachers, including Counselors, and other professional staff will now be filled by an interview process in at least 93 of the 160 sites; seniority can be a factor in these cases.

Part V of the Administrators and Supervisors Council contract (central assignment) indicates that a superintendent can assign and reassign members within their certification area.(UX 13, the contract with Local 1616). Recreation grounds keepers are assigned by an administrator of DSCS based on seniority and qualifications. Materials handlers are given preference for new and vacant positions based on seniority and classifications. Social Work Aides are assigned, and can request transfers on openings. (Appendix D sec. D). Facilities and Maintenance Service Employees are assigned and transferred by the board. Transfers are requested by employees; seniority is considered. Seniority is also a "major consideration" in filling Operating Engineer (Local 950) vacancies; more senior ones are interviewed, and the Employer must justify not selecting the most senior bidder.

Kitchen delivery drivers pick their routes each year by seniority. Clerical-Technical employees (Local 1053) are assigned and transferred by the superintendent (if not violating seniority). Vacancies are posted; eligible employees are interviewed based on seniority. School Accountants and Bookkeepers (MTEA) are assigned, reassigned, and transferred by the superintendent. Vacancies are filled based on seniority (Part V). Educational Assistants (MTEA) vacancies are filled by interviews of the 3 most senior bidders, if there are interested assistants, or by Human

Resources recommendation. The three most senior Secretaries interview with a principal or department head for vacant positions before they may be filled from Civil Service lists. These remain in their sites unless excessed, at which time seniority determines layoff and transfer. Transfers to vacant positions follow system-wide seniority. Once assigned, Teachers (MTEA) remain at their site unless there are enrollment declines (then by reverse seniority). Vacancies are filled with the more senior qualified applicants, presumably in those schools not electing the interview process, according to the Director of Labor Relations. ESL and Diagnostic teachers are assigned without regard to seniority; Deaf and Hearing Impaired Interpreters also are assigned following the student needs.

Conclusion with regard to this criterion is difficult. The Union's proposed assignment process of annual bidding by SNAs for sites such as exemplified by the Social workers is not supportable by the comparisons with other employee groups, particularly in cases where staffing needs vary in response to shifting student patterns. On the other hand, no formal consideration for seniority also does not seem to be the norm at this time. The current provision for involuntary transfers of SNAs is also not the norm. While there are opportunities for the Board to reduce or increase positions at sites in response to changing student populations or their needs, the assignments are generally considered permanent except in those cases where more specialized, child-centered, less routine or predictable services are provided.

Interests and welfare of the public

The Union has not made reference to the interests and welfare of the public on the matter of the copying costs, and oblique reference to it on the matter of site assignment. The Union has argued that SNAs who want to stay in a site and have a good relationship with students and staff should be able to do so. This will promote continuity of service as well as fairness in the employment relation resulting in better employee morale and performance. Contrary to the Board's contention, the SNAs have only grieved because they wanted to remain at a site rather than constantly move. Little is gained by involuntary transfer since the SNAs are all trained and interchangeable. There is no particular gain by placing new SNAs with experienced ones since the latter have not been advised that they were doing any training of the former. Moreover parents and principals have not been the instigators of the involuntary transfers which have taken place. Finally, the public will not gain when reassignment is primarily used as punishment rather than in the interests of children.

The Employer has argued that the interests and welfare of the public is better served by an award

in its favor on the matter of site assignment. The Undersigned infers that it maintains that the sharing of contract printing based on cost reduction is in the interests of the public, and he would add that perhaps the provisions of the new plan may encourage more economy in the printing and distribution of the Contracts.

The Employer has gone to considerable length and detail to impress upon the Undersigned the challenges and risks of medical services performed by the SNAs. It has argued that it is critical that the nurse supervisors are able to match the SNAs with the children served, that they have an ability to provide the SNAs with the appropriate length of assignments, that they can assure that new SNAs go to Gaenslen or another appropriate site, and that they have the ability to assure that all the sites are appropriately staffed. There has not been clear, convincing evidence that each of the current SNAs cannot perform these services. Testimony of a private duty nurse who panicked, and of "hearing that others" have done the same in certain situations was given. Testimony was also given that some SNAs are more comfortable working with some children or procedures than others. The nurse supervisors testified that SNAs, like other professionals vary in their abilities, perceptions, maturity, judgement, and other factors which the arbitrator can accept.

The Arbitrator would agree that the interests and welfare of the public tends to favor the Board over the Union in the case of this unit for several reasons. When an SNA is newly recruited, (s)he may not immediately go through the Children's Memorial training program so as to gain knowledge and breadth of learning procedures. It seems reasonable that the nurse supervisors would need to have control over where that SNA was placed which would be more difficult under the Union's proposal. The position(s) assigned as "floater" would plausibly be one of the least likely to be chosen under a "bidding" process; it seems reasonable to the Undersigned that the best interests of the public would be served by having this position filled by whomever the supervisors believed had the most breadth of experience, judgement, was adaptable, and had other appropriate characteristics. The Undersigned is particularly concerned that under the Union's proposal the least senior, least qualified may be assigned to the most difficult or least desirable site. This problem is of course not limited to SNAs, since other MPS employees may bid for openings in more choice sites by seniority and qualifications, which may constantly relegate some sites/schools to having the least experienced or qualified employees. Difficulties arising from those assignments may be different in that the instant case involves "life or death" issues, according to the nurse supervisors. He would also accept that there are qualitative differences between SNAs and nurses, as with other professionals, and that these may be of critical importance–even though there has apparently not yet been a case where a MPS SNA has failed to act appropriately resulting in the death of a child (and the Board may argue

that its ability to assign SNAs may account for this).

The Arbitrator would also agree that the interests of the public may be better served by providing for new SNAs to be assigned to Gaenslen or another site, particularly when there has been a new RN (here, Nurse Supervisor) professional responsibility for delegating procedures performed by the SNAs. By having at Gaenslen other SNAs and an RN around for the new SNA, there is an opportunity for observation (by and of the new SNA) as well as support before the SNA is sent to work at another site. While the Union has argued that 6 of the SNAs hadn't been to Gaenslen, the Undersigned suspects that this would not have been possible for the original 6 hired in 1992. Finally, the Arbitrator is of the opinion that the new court decision extending public schools' responsibilities for children needing continuous nursing care (vs. predictable and scheduled care), and to provide that care in the schools of the parents' choice poses a greater burden on the public, whose interests may be better served by allowing the nurse supervisors to continue to make assignments based on the needs of the District and the population served as well as the desires of the SNAs. He concludes this presuming that the Board through the nurse supervisors would not assign SNAs arbitrarily or punitively so as to cause SNAs morale or other problems which may then be contrary to the well-being of the children.

The position of the Union with respect to contract printing is to be preferred. The position of the Board for assignment of SNAs is to be preferred based on the interests and welfare of the public and such other factors. While comparisons with other employees indicates that the Union's proposal is reasonable, the nature of the work of the SNAs suggests that they are different and that its current proposal for assignment is not to be preferred.

Award

Having carefully considered all of the evidence and argument of the Parties set forth above as well as the arbitral criteria provided under Section 111.70 Wisc. Stats., it is the decision of the Undersigned that:

> The final offer of the Employer is to be incorporated into the 1997-99 Collective Bargaining Agreement between Service Employees International Union, Local 150 and the Milwaukee Board of School Directors.

Dated this 24th day of May, 2000.

Richard Tyson, Arbitrator